1992

State of Utah v. Daniel J. Brooks : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 920853-CA
v.	:	
COREY LYNN BROOKS,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL BY DEFENDANT OF CONVICTIONS FOR AGGRAVATED ROBBERY, UTAH CODE ANN. § 76-6-302 (1990), AGGRAVATED BURGLARY, UTAH CODE ANN. § 76-6-203 (1990), BOTH FIRST DEGREE FELONIES, AND POSSESSION OF A DANGEROUS WEAPON BY A RESTRICTED PERSON, UTAH CODE ANN. § 76-10-503(2) (SUPP. 1992), A SECOND DEGREE FELONY, ENTERED IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, UTAH, THE HONORABLE KENNETH RIGTRUP, PRESIDING.

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

Defendant Corey Lynn Brooks appeals his convictions of aggravated robbery and aggravated burglary, in violation of Utah Code Ann. §§ 76-6-302 and 76-6-203 (1990), both first degree felonies, entered upon jury verdicts, and possession of a dangerous weapon by a restricted person, in violation of Utah Code Ann. § 76-10-503(2) (Supp. 1992), a second degree felony, entered upon a bench verdict. The convictions were entered by the Third Judicial District Court, in and for Salt Lake County, the Honorable Kenneth Rigtrup, presiding. The Utah Supreme Court had jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(i) (1992). Pursuant to Utah Code Ann. § 78-2a-3(2)(k) (Supp. 1992), the supreme court transferred this appeal to this Court.

ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

1. Do the principles of either "plain error" or "ineffective assistance of counsel" overcome defendant's trial-level waiver of jury selection issues, such that a new trial should be ordered? Absent post-trial evidentiary proceedings,

appellate review for plain error or counsel ineffectiveness is necessarily conducted de novo, without reference to traditional standards of review, upon examination of the underlying trial record. See State v. Ellifritz, 835 P.2d 170, 174-75 (Utah App. 1992), and authorities cited therein.

2. Was defendant permissibly convicted of both aggravated burglary and aggravated robbery, where the same criminal episode included both a home entry and a taking of property by force or fear? Properly framed, this question asks whether, upon examining the defining statutes, either the burglary or the robbery is a lesser included offense within the other, such that defendant could not properly be convicted of both. As such, it is a question of law, reviewed without deference to the trial court. See State v. Bradley, 752 P.2d 874, 877 (Utah 1985).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Many of the pertinent constitutional provisions, statutes, and rules are set forth in Appendix 1 to defendant's opening Brief of Appellant. Utah's Jury Selection and Service Act, Utah Code Ann. §§ 78-46-1 through -23 (1992), containing additional pertinent law in effect at the time of defendant's March 1992 trial, is reproduced in Appendix I of this brief, as is Article V, section 1 of the Utah Constitution, the "distribution of powers" provision.

STATEMENT OF THE CASE

As set forth in his Brief of Appellant, defendant's first trial on the aggravated robbery and aggravated burglary charges resulted in a hung jury, and a mistrial ruling (R. 36). Defendant then obtained new counsel, and was re-tried (R. 79, 261-847).[1] Upon re-trial, the jury found defendant guilty of both charges (R. 203-04). Because defendant used a gun to commit the offenses, and because he was on parole when he committed them, the trial court then found defendant guilty of the additional offense of possession of a dangerous weapon by a restricted person (R. 610).

Defendant was sentenced concurrently for each offense, plus ordered to pay fines and make restitution; a consecutive firearm enhancement was added. These sentences were imposed to run consecutive to another, uncompleted sentence at the Utah State Prison (R. 210-17). Trial counsel then withdrew, and the Salt Lake Legal Defender Association resumed defendant's representation for this appeal (R. 224-26).

STATEMENT OF FACTS

The Offenses

The evidence supporting the jury's verdict is fairly straightforward.[2] Defendant responded to a classified

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[1]The State parenthetically references the trial transcript (R. 261-847) by its contiguous numbering with the main record.

[2]"In reviewing a jury verdict, we view the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict." State v. Seale, 207 Utah Adv. Rep. 10, 11 (Utah Feb. 24, 1993) (citing authorities).

advertisement placed by Stephanie Vert, offering a distinctive "marquise" diamond ring for sale (R. 340-44, 441-42). He examined the ring at the Vert home, spending thirty to forty-five minutes in the company of Stephanie Vert and her mother, Martha Vert (R. 346, 445). During this visit, defendant carried a large "walkie-talkie" (R. 346, 446). Defendant told the Verts that he wished to purchase the ring, and made arrangements to return to their home the next morning for that purpose (R. 347, 446).

Stephanie Vert was the only person home when defendant returned the next morning (R. 448-49). Defendant still carried the walkie-talkie, and was wearing a hat, gloves, and "rainbow"-type sunglasses (R. 450-52). Stephanie let defendant into the home and offered him some coffee. Defendant picked up the diamond ring, then pointed a pistol at Stephanie and ordered her to crawl into a bathroom (R. 452). When she complied, defendant produced handcuffs and ordered Stephanie to cuff herself to plumbing beneath the sink. When she initially "did it wrong," defendant produced handcuff keys and made Stephanie re-cuff herself. He then threatened her, "You better not remember what I look like" (R. 453-54).

Defendant spent ten to twelve minutes rummaging about the Vert home (R. 457). Using the walkie-talkie, he spoke to an apparent accomplice, arranging to be picked up outside the home (R. 455-56).[3] When defendant left, Stephanie freed herself by

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[3]Defendant and the accomplice, Mark McGrath, had assisted another friend in the purchase of a pistol about a week before the robbery (R. 503-09, 561, 678-81). The inference drawn by the

unscrewing the plumbing, and summoned help (R. 457). Upon inspection, the Verts estimated that defendant had stolen several thousand dollars' worth of jewelry, including the diamond ring, from their home (R. 354-61).

A day or two before the robbery, defendant had visited a friend (R. 485). He had two pairs of handcuffs with him at that time, one of which he had briefly placed on his friend's young child. The friend had also handled the cuffs, and defendant talked about wiping fingerprints from them (R. 488).

Shortly after the robbery--apparently the same day--defendant visited some other friends (R. 568-71, 642-43). During this visit, defendant displayed some jewelry, including a marquise diamond ring, offering to sell the jewelry to these friends (R. 572-73, 578, 644-45, 697-98). Also during the visit, defendant and his friends saw a television account of the Vert robbery. To one of these friends, defendant boasted that he had committed the robbery (R. 648-50). At the end of this visit, defendant gave one item of jewelry--a gold or gold-plated chain--to his friends (R. 573, 647). The friends subsequently called the police, and turned the chain over to them (R. 574-77, 650). Martha Vert later identified the chain as one of the items taken from her home (R. 357-58). This was apparently the only stolen item that was recovered (R. 357).

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prosecution was that the pistol was purchased for defendant and McGrath, and was used in the robbery (R. 837-38).

Stephanie Vert's identification of defendant as the robber was positive in several respects. On the day of the robbery, she told investigating police officers that the robber had a silver tooth. When arrested, defendant had a silver tooth (R. 637, 743-44, 750). About a week after the robbery, Stephanie quickly identified defendant from a photo array (R. 745, 747). Several months after that, she viewed a live lineup, and again unhesitatingly identified defendant as the robber (R. 458-59).[4]

Martha Vert had more difficulty identifying defendant from the photo array than did Stephanie. At the lineup, however, Martha identified defendant as the person who had examined the diamond ring on the night before the robbery (R. 347, 510-11).

Jury Selection

Because defendant's "plain error" and "counsel ineffectiveness" arguments focus on jury selection, a separate overview of that procedure is appropriate. Jury selection began with a panel of twenty-two prospective jurors (R. 151-52). Initial voir dire covered possible panelist acquaintance with the parties, court personnel, attorneys, and witnesses (R. 263-67). The trial court explained the charges, and ascertained that no panelists had heard about the case against defendant (R. 268).

Predicting a four-day trial, the court asked the panelists whether they had any personal matters that might

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[4]Represented by counsel, defendant was readily identified from the lineup, which included seven other similarly-attired, fairly similar-appearing young men (State's Exhibit 14 at 9, 17, and photograph Exhibits 15-24, admitted into evidence at R. 759-60, and contained in record envelope).

conflict with their jury service (R. 268; the pertinent portions of juror voir dire are reproduced in Appendix II of this brief). Panelist Frank Barber responded that he was obliged to transport his wife to physical therapy three times per week (R. 268-69). The trial court asked Barber to try to change the therapy schedule, or to make other transportation arrangements, and assured Barber that the trial proceedings would recess on time to accommodate his needs. Barber responded, "I am not sure that I could devote my undivided attention to the case under the circumstances" (R. 269-70). However, Barber said nothing to indicate that he would be biased toward either the defense or the prosecution for any reason.

An engineer employed by a computer company, and who had no prior jury experience, Barber did sit on the trial jury (R. 156, 281). The original record on appeal does not reveal whether Barber resolved his schedule conflict. However, juror Barber subsequently executed an affidavit stating that he did arrange to accommodate both the trial schedule and his wife's therapy appointments. Reference to that affidavit should not be critical to the resolution of this appeal. However, in the event this Court deems otherwise, this brief is accompanied by a motion to supplement the record on appeal with Barber's affidavit (the affidavit and motion are copied at Appendix III of this brief).

The trial court asked the panelists whether they had ever been subjected to assaults or threats, as would accompany a robbery; it then expanded this query to include experience as

burglary victims (R. 306, 308). Several panelists responded affirmatively.

Panelist Larry Pike stated, "As a child, our home was burglarized when we were there" (R. 310). At the time of defendant's trial, Pike was married, was a master's-level electrical engineer and the father of two children; he also had past jury experience (R. 274-75). Pike indicated no problem when the trial court asked the crime-experienced panelists whether they could try this case impartially (R. 310-311). Pike sat on the trial jury (R. 156).

Panelist Daniel Heap stated, "I've had my house broke into before, and our vehicles twice in the last couple of years" (R. 309-10). Heap, married with two grown children, was a long-time "fleet maintenance" worker for Salt Lake County; this was his first jury duty (R. 276-77). He also did not report any possible bias stemming from his experience as a crime victim (R. 309-10), and also sat on defendant's trial jury (R. 156).

Panelist Phyllis Geurts reported, "On two different occasions we've had somebody walk in our unlocked back door and take my purse" (R. 309). A self-described "stay-at-home mother," Geurts was a first-time jury panelist (R. 278). She was interviewed in chambers because her husband had been a defense witness in another criminal case, prosecuted by the same prosecutor responsible for this trial. The prosecutor also believed that he and Mrs. Geurts might have lived in the same church ward at some time (R. 314-15). Questioned by defense

counsel, Geurts stated that these factors would not affect her impartiality (R. 315). Geurts did not sit, for she was removed by a defense peremptory challenge (R. 151).

The only two panelists who had themselves been victims of violent crime--Alta Ludlow and Debra Trump--were called into chambers for followup voir dire.[5] Besides having been an assault victim, panelist Ludlow had endured several burglaries (R. 319-20). Asked if these experiences would affect her as a juror, she stated: "I really don't know. I mean, just talking about it makes me feel kind of sick. I think if somebody tried to hurt me, or, you know, if I were to put myself in, say, the victim's circumstances, I might just decide because I know how it feels" (R. 320). Defense counsel followed up on this comment, asking Ludlow whether her past experience might "cloud [her] judgment." She responded: "It would be hard. I'll be honest" (R. 321). Accordingly, the parties and the court agreed to strike Ludlow for cause (R. 324).

Panelist Debra Trump, a bank teller, related her experience as a bank robbery victim (R. 315-16). Defense counsel quizzed her about another experience--picking a forgery suspect from a lineup (R. 317-18). In light of both experiences, Trump

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[5]By "victims of violent crime," the State means persons who had been personally assaulted or threatened. This includes Ms. Ludlow, who herself had been assaulted (R. 307), and Ms. Trump, who had been on-duty as a teller during a bank robbery (R. 308). Panelists Roatcap, Rhodes, Sandberg, and Christensen had friends or relatives who had been assaulted or robbed (R. 307-09), but were not themselves victims. Panelists Ludlow, Pickering, Woodside, Geurts, Heap, and Pike had been victims of burglary unattended by personal violence (R. 307-10).

asserted an ability to try this case impartially (R. 316, 318-19). Rather far down the jury list, however, Trump did not sit as a juror in defendant's trial (R. 151).

Another panelist at the very end of the list, Gary Pickering, was excused for cause at defense counsel's request, without in-chambers voir dire (R. 152, 324). Pickering had been a burglary victim some years earlier (R. 307-08). Quite aside from this, Pickering asserted throughout voir dire that his beliefs as a Jehovah's Witness compelled him to resist jury duty (e.g., R. 270, 294). He stated: "[B]ecause of conscience, I won't serve. I prefer a jail sentence" (R. 264).

SUMMARY OF ARGUMENT

Defendant has proven neither "plain error" nor "counsel ineffectiveness," such that the jury selection issues that he raises for the first time on appeal should warrant reversal of his conviction. No Utah appellate opinion has held that a trial court's decision to conduct less-searching voir dire than defendant now demands would amount, on appeal, to obvious error. Here the trial court focused its voir dire upon those jurors who appeared most likely to carry unacceptable biases, and respected the privacy of others. This was a proper exercise of the trial court's discretion. Even if the trial court might have abused its discretion, defendant has not shown that he was harmed as a result, and his "plain error" argument also fails on this basis.

Defense counsel's choice to not more aggressively interrogate and challenge prospective jurors for cause was

permissible under the wide latitude that must be afforded to trial counsel. Active in the jury selection process, counsel appropriately removed those jurors whose impartiality was most questionable. In his professional judgment, counsel was allowed to do this either by for-cause or peremptory challenges. Therefore, "counsel ineffectiveness," like plain error, does not afford defendant a new trial, based upon jury selection arguments raised for the first time on appeal.

Defendant's argument that he cannot be convicted of both robbery and burglary can be summarily rejected. Properly framed, his argument is that one of these offenses is a lesser offense included within the other; a quick review of the elements of each offense demonstrates that this is not so. Each offense contains an element that is absent in the other. Therefore, it is entirely appropriate to hold defendant liable for both robbery and burglary, for these were separate offenses committed during the same criminal episode.

ARGUMENT

POINT ONE

THE JURY SELECTION PROCESS WAS FREE FROM REVERSIBLE "PLAIN ERROR," AND TRIAL COUNSEL PERFORMED EFFECTIVELY IN JURY SELECTION.

Defendant first argues that the trial jury was improperly selected, in violation of his constitutional right to an impartial jury. In particular, he argues that panelists Frank Barber, Larry Pike, and Daniel Heap, who all sat on the jury, should have been questioned more probingly during voir dire, or

else challenged for cause. Panelist Phyllis Geurts, he argues, should also have been challenged for cause, rather than removed with a defense peremptory challenge.

Defendant did not object to the now-asserted improprieties at trial, and jury selection errors are normally waived on appeal absent a timely trial court objection. See Utah R. Crim. P. 18(c); State v. DeMille, 756 P.2d 81, 83 (Utah 1988) (jury selection issue waived under Rule 18(c)); State v. Miller, 674 P.2d 130, 131 (Utah 1983) (same, under Utah R. Crim. P. 12(d) timely objection rule).[6] On appeal, represented by new counsel, defendant seeks relief from his jury selection waiver under either the "plain error" or "ineffective counsel" doctrines. These arguments will be considered in turn.

A. Absence of "Plain Error."

The "plain error" exception to the waiver rule has been fully explained in State v. Eldredge, 773 P.2d 29 (Utah), cert. denied, 493 U.S. 814, 110 S. Ct. 62 (1989), State v. Verde, 770 P.2d 116 (Utah 1989), and State v. Archambeau, 820 P.2d 920 (Utah

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[6]Rule 18(c)(1)(ii) states in part, "The challenge to the [jury] panel shall be taken before the jury is sworn . . ." (emphasis added). Rule 18(c)(2) states in part: "A challenge to an individual juror may be made only before the jury is sworn to try the action, except the court may, for good cause, permit it to be made after the juror is sworn but before any of the evidence is presented. In challenges for cause the rules relating to challenges to a panel and the hearings thereon shall apply" (emphasis added).

Defendant argues that under Rules 18 and 20, Utah Rules of Criminal Procedure, "defense attorneys are not required to object to the omissions of the trial courts" (Br. of Appellant at 16). This astonishing proposition finds no support in the cited rules, flies in the face of "black letter" legal principle, and will not be further addressed in this brief.

App. 1991). The plain error exception contains two elements: First, the error must be "obvious," compelling a conclusion that the trial court should have known that it was committing error. Second, the error must be "harmful" or "prejudicial;" that is, there must be a reasonable likelihood that absent the error, the trial outcome would have been more favorable to the appellant. Eldredge, 773 P.2d at 35.[7] Defendant has not demonstrated the existence of either element here.

1. No "Obvious" Error.

Juror Frank Barber

Under plain error analysis, defendant's argument that "[j]uror Barber was incompetent" (Br. of appellant at 7) must be restated as "juror Barber was obviously incompetent," and therefore should not have been seated on the jury. Defendant's argument fails, for he misunderstands the term "incompetent."

"Competence" and "incompetence" to serve as a juror are defined in Utah Code Ann. §§ 78-46-7 and 78-46-8 (1992), within Utah's Jury Selection and Service Act (reproduced in Appendix I of this brief).[8] Under section 78-46-7, competence for jury

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[7]In Archambeau, 820 P.2d at 922, this Court identified "plain error" and "exceptional circumstances" as distinct doctrines that may afford relief from the waiver (or "procedural default") rule. The State prefers to view both plain error and "counsel ineffectiveness" as subcategories under "exceptional circumstances." Both doctrines, after all, are "exceptions" to the general waiver rule.

[8]The Jury Selection and Service Act was amended, effective after defendant's March 1992 trial. The amendments relating to the arguments raised in this appeal appear to be largely in arrangement of the various provisions rather than in substantive content. See Utah Code Ann. § 78-46-7, -8, -10, -12, -15 (Supp.

service consists of citizenship, age, residency, and English language requirements. Section 78-46-8 declares that convicted felons, active duty military personnel, and persons with mental and physical disabilities are not competent to serve. Juror competence, therefore, addresses basic, minimal qualifications for jury service.

Competence does not, as defendant seems to argue, deal with juror "bias." Bias is covered by distinctive provisions of Rule 18(e), Utah Rules of Criminal Procedure. As summarized in Rule 18(e)(14), bias refers to "a state of mind [that] exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging . . ." (emphasis added). Bias, then, is a mental state favoring one party over the other. A challenge for cause will lie against a juror who is either incompetent or is biased (or both), see Rule 18(e) (1), (2), (14). However, incompetence and bias are not overlapping characteristics.

Juror Barber was not obviously incompetent, such that the trial court erred in failing, on its own motion, to remove him for cause. Barber only stated that he had a schedule conflict, posed by his wife's physical therapy appointments, that might cause him to be less than fully attentive at trial (R. 270). This clearly does not amount to a "mental disability," a

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1992). For clarity, the provisions actually in force at the time of defendant's trial are used in this brief.

form of incompetence under the Jury Selection and Service Act. Well-educated, and employed as an engineer (R. 281), Barber was not "disabled" by his schedule conflict.[9]

Further, by its terms, the Jury Selection and Service Act contemplates that "mental disability" is generally raised by the prospective juror, not by a party. Even then, the trial court is not bound to remove the juror; instead, the court may require "a physician's certificate verifying the disability." See section 78-46-8(c). Accordingly, the trial court in this case was in no way required to view Juror Barber as "incompetent" under the controlling law, and to remove him for cause based upon the possible distracting influence of his schedule conflict.

Even though Barber professed an inability to devote full attention to defendant's trial, given his need to care for his wife, the trial court could not possibly predict which party would be prejudiced by that distraction. Absent any for-cause challenge, the trial court could quite reasonably presume that the risk of prejudice--that is, the risk that Barber would be biased--was equally borne between the parties. Therefore, the court properly chose not to interfere with both parties' decisions, implicit in their lack of any challenge to him, that Barber was a desirable juror.

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[9]Most of the cases cited by defendant in support of his "incompetence" argument, as he describes them (Br. of Appellant at 11-12), uphold trial court discretion to remove certain jurors. The cases that seemingly command removal involve more serious disabilities such as physical or mental impairment, poor hearing, inability to understand English, and sleeping--factors not present in this case.

If there was any legitimate reason to remove Barber from jury service, that reason lay in section 78-46-15 of the Jury Selection and Service Act. That provision allows trial courts, at their discretion, to excuse prospective jurors on grounds of "undue hardship, extreme inconvenience, or public necessity . . .." However, Rule 18(h), Utah Rules of Criminal Procedure, states that "[a] statutory exemption from service as a juror is a privilege of the person exempted and is not a ground for challenge for cause" (emphasis added). Therefore, defendant cannot complain of the failure to grant Barber a "hardship" exemption; under Rule 18(h), he has no standing to do so.

Finally, it now appears, based upon the post-trial affidavit of Mr. Barber, that he did in fact resolve the conflict posed by his responsibility toward his wife, as requested by the trial court. This fact need not be supplemented into the record if this Court agrees with the legal analysis already presented. However, if this Court rejects that analysis, the State asks it to consider Barber's affidavit, in support of the argument that it was not "obvious error" to seat him on this jury.

On no legitimate basis, then, has defendant shown "obvious" error in the trial court's decision to seat Barber on the trial jury. Barber was neither incompetent, biased, nor otherwise obviously subject to dismissal from jury service.

Jurors Larry Pike and Daniel Heap

Defendant argues that because jurors Pike and Heap had both been burglary victims (R. 309-10), an "inference of bias"

attached to each. His argument relies upon State v. Woolley, 810 P.2d 440 (Utah App.), cert. denied, 826 P.2d 651 (Utah 1991). In Woolley, a panel majority held that an "inference of bias" arises when a prospective juror has been a victim of a crime similar to the one being tried. 810 P.2d at 443 (quoting State v. Cobb, 774 P.2d 1123, 1126 (Utah 1989)). The majority then held that under such circumstances, "the trial judge must probe the juror to insure that he or she can decide the case impartially despite the past victimization . . .." Id. at 444 (emphasis added).

Based upon the foregoing language, defendant's argument is that the trial court committed "obvious" error when it failed to thoroughly "probe" jurors Pike and Heap about their past experience as burglary victims, even though no such "probing" was requested by counsel. While Woolley can be read to support defendant's argument, there are several reasons why this Court should not do so.

First, Woolley was a case where the crime-victim jury panelists were challenged by trial counsel. 810 P.2d at 441-42. Woolley thus arose in the traditional manner: the jury selection issue had been properly preserved for appeal. Thus despite the strong criticism that it levelled at the trial court, the Woolley majority did not hold that the failure to more fully "probe" the victim-panelists would have been "obvious" error, even absent a timely challenge.[10] In fact, in a post-Woolley decision, State

[10]In State v. James, 819 P.2d 781 (Utah 1991), also relied upon by defendant, the supreme court, exercising its "supervisory role over the lower courts," "remind[ed] trial judges to take

v. Ellifritz, 835 P.2d 170, 177 (Utah App. 1992), this Court implicitly rejected an "obvious error" argument where the defendant raised jury selection issues for the first time on appeal, as does this defendant.

Next, the Woolley majority discerned "no good policy reason not to require probing to clarify any possible prejudice when fundamental rights are at stake." 810 P.2d at 444. One such reason, however, was acknowledged after Woolley, and before this defendant's trial. In State v. Sherard, 818 P.2d 554 (Utah App. 1991), cert. denied, 843 P.2d 516 (Utah 1992), this Court affirmed "the trial court's duty to protect juror privacy." 818 P.2d at 559 (internal quotations omitted, quoting State v. Ball, 685 P.2d 1055, 1060 (Utah 1984)). It was therefore within the trial court's sound discretion here to respect the privacy of jurors Pike and Heap, and not "probe" them about their past burglaries.[11]

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care to adequately and completely probe jurors on all possible issues of bias, including press coverage." Id. at 797-98. Unfortunately, by not "commenting upon the effectiveness or the wisdom of the process of voir dire" that had been conducted in James, id. at 797, or even describing the process, the supreme court gave no guidance about what constitutes "adequate" versus "inadequate" voir dire. James, then, is a poor source, if it is any source at all, for an "obvious error" ruling in this case.

[11]The Woolley majority recognized the varying formulations of the discretion afforded to trial courts in jury selection--including "sound discretion" and "some deference." 810 P.2d at 442 n.2. In Ellifritz, 835 P.2d at 174, this Court identified a "broad discretion" standard. The governing voir dire rule, Utah R. Crim. P. 18(b), remains couched in discretionary language (trial court "may permit counsel or the defendant to supplement the examination by such further inquiry as it deems proper . . ." (emphasis added)). If courts now "must probe" certain prospective jurors more deeply, it seems that Rule 18(b) should

Additionally, Pike and Heap did not respond when the trial court asked the general question, immediately upon identification of the victim-panelists, whether "anything" might cause them to be biased (R. 310-11). Because Pike and Heap thus tacitly asserted that their past experiences would not prejudice them against defendant, no "obvious error" should be found in the trial court's determination that they could in fact "well and truly try the matter in issue," as they were sworn to do under Rule 18(i), Utah Rules of Criminal Procedure.

Further, the trial court did individually examine the prospective jurors who had been direct victims of violent crimes, i.e., assault and robbery. One of those victims, Alta Ludlow, was properly excused for cause upon her admission of likely resulting bias (R. 320). (The other, Debra Trump, did not require a for-cause challenge--if indeed such challenge might have been granted over her assertion of impartiality (R. 318-19), for she was too far down the jury list to be selected.) By focusing voir dire scrutiny upon those panelists who had been directly assaulted--and therefore more severely traumatized--as crime victims, the court showed that it knew how to, and indeed did, properly exercise its discretion in jury selection. There was no "obvious error" in its decision to not "probe" the victim-panelists who had been burglarized, but not directly assaulted.

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be amended, via the Utah Supreme Court's rulemaking process, see Utah Code Jud. Admin. R. 11-101, to reflect that requirement.

Finally, the notion that prospective jurors are "inferentially biased," because of past victimization in similar crimes, ought to be seriously questioned. That judicially-created inference contradicts an express policy statement in Utah's Jury Selection and Service Act:

> It is the policy of this state that persons selected for jury or grand jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with this chapter to be considered for service and have the obligation to serve when summoned for that purpose.

Utah Code Ann. § 78-46-2 (1992).

Courts should not circumvent the expressed legislative intention that "all qualified citizens" have the right and the duty to serve on criminal juries, by imposing an unproven "inference of bias" upon those who have themselves been crime victims.[12] In light of section 78-46-2, that practice violates Article V, section 1 of the Utah Constitution (Appendix I of this brief), an express "distribution of powers" declaration. It also re-victimizes law-abiding citizens who have been crime victims, by eroding their jury service right. Accordingly, the practice

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[12]The State is aware of no empirical proof that past experience as a crime victim necessarily affects a citizen's ability to act as an impartial juror in a similar but unrelated case. Compare Ballew v. Georgia, 435 U.S. 223, 230-45, 98 S. Ct. 1029, 1034-41 (1978) (holding that jury must have at least six members, to assure a constitutionally-required impartial jury in nonpetty criminal trials, after reviewing scientific studies of group decisionmaking process). Cf. Davis v. State, 93 Md. App. 89, 611 A.2d 1008, 1010 (criticising "tall tales" by "storied masters of trial advocacy," championing expansive juror voir dire), cert. granted, ___ Md. ___, 616 A.2d 1286 (1992).

should not be sanctioned, especially not by finding "obvious error" in decisions not to intrusively "probe" such citizens, or exclude them from jury service.

Panelist Phyllis Geurts

Defense counsel used a peremptory challenge to exclude panelist Geurts from the jury (R. 151). Utah's appellate courts have held that "[i]t is prejudicial error to compel a party to exercise a peremptory challenge to remove a prospective juror who should have been removed for cause." Woolley, 810 P.2d at 440 (citing authority). Here, however, defendant was not "compelled" to remove Geurts with a peremptory challenge, for he raised no for-cause challenge against her.

Further, one potential problem with panelist Geurts was the fact that her husband had once been a defense witness, adverse to the same prosecutor who represented the State in this trial (R. 314-15). Thus while her experience as a burglary victim yields an unproven "inference" that Geurts might have been predisposed against defendant, her husband's past adverse role against the prosecutor might equally have predisposed Geurts against the State. With these facts known, plus Geurts's shared religious affiliation with the prosecutor, the trial court did not commit "obvious" error when it did not take matters into its own hands, and excuse Geurts for cause.

2. No Likelihood of a More Favorable Result.

If this Court agrees that no "obvious" error occurred in the jury selection process, it need proceed no further.

Instead, it can hold that defendant is not entitled to relief from the trial-level waiver of his jury selection arguments, for he has not proven the "obviousness" element of "plain error." In Eldredge, 773 P.2d at 36, the Utah Supreme Court did just this, in disposing of an evidentiary argument first raised on appeal.

Even if some "obvious" error in jury selection were found by this Court, defendant makes no effort to demonstrate a reasonable likelihood of a more favorable trial verdict, absent such error. Because it is clearly his burden to make such a showing of prejudice, see Verde, 770 P.2d at 122, his "plain error" argument also fails on this basis.

Apparently defendant wants this Court to declare that the trial jury, composed of eight law-abiding citizens, who all asserted an ability to try his case fairly, was nevertheless biased, in violation of his constitutional right to an impartial jury. U.S. Const. Amend. VI; Utah Const. Art. I, § 12. All of those jurors, however, were passed for cause by trial counsel and the trial court, who observed the jurors first-hand. Neither this Court nor defendant's appellate counsel enjoys that "advantaged view." See State v. Ellifritz, 835 P.2d 170, 177 (Utah App. 1992) (declining to find plain error in jury selection, where the trial court and the parties had advantaged view of actual jurors). Accordingly, this Court ought not set aside the trial-level judgment, shared by court and counsel, that an impartial jury had been seated.

Indeed, the United States Supreme Court has stated that an impartial jury is achieved through the collective mix of a group of jurors. Each individual juror, it is understood, will hold certain biases:

> [T]he smaller the group, the less likely it is to overcome the biases of its members to obtain an accurate result. When individual and group decisionmaking were compared, it was seen that groups performed better because prejudices of individuals were frequently counterbalanced, and objectivity resulted. . . .. Because juries frequently face complex problems laden with value choices, the benefits are important and should be retained. In particular, the counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case.

Ballew v. Georgia, 435 U.S. 223, 233-34, 98 S. Ct. 1029, 1035-36 (1978) (emphasis added; footnotes omitted). In other words, an impartial jury is not achieved by "ferreting out" all possible bias from every individual juror.[13] Instead, it is achieved by recognizing that each individual juror holds some biases, and that unless extreme, such biases will be counterbalanced by other jurors' biases.

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[13]Ballew (1978), in the State's view, supersedes the language in Turner v. Louisiana, 379 U.S. 466, 85 S. Ct. 546 (1965), quoted in Br. of Appellant at 14, suggesting that every individual juror must be free of all bias. Turner also involved improper jury-witness contact, a factor absent here.

The "ferreting" metaphor is interesting, derived from ferret, a "form of the Old World polecat, often trained to hunt rats or rabbits," or a "weaselike mammal." Webster's II New Riverside University Dictionary 472 (Houghton Mifflin 1988). It calls to mind a jury of rats and rabbits, set upon by polecats and weasels, and fosters the cynical view that lay citizens and attorneys commonly hold toward each other.

Utah felony juries already exceed the federal impartiality standard, based upon the number of required jurors: Ballew sets a minimum of six jurors for nonpetty criminal juries. 435 U.S. at 243-45, 98 S. Ct. at 1041. However, Article I, section 10 of the Utah Constitution explicitly mandates that noncapital felonies be tried to an eight-member jury. Obviously, this enhances the bias-counterbalancing effect of the group decision process in Utah courts.

In apparently arguing that this trial jury was not impartial, defendant therefore erroneously focuses upon only three of the eight jurors: Barber, Pike, and Heap. Even if those three jurors might have had some slight bias against defendant--stemming from schedule conflicts, past crime victimization, or whatever, this says absolutely nothing about the other five jurors. In light of Ballew and the higher Utah standard for minimum jury size, it is entirely appropriate to assume that at least some of those five jurors held defense-favorable biases, counterbalancing any possible defense-adverse biases held by their three colleagues.

Defendant also attempts to prove jury bias by arguing that one of his peremptory challenges was wasted on panelist Geurts, who he claims should have been excused for cause. This attempt is grounded in the following pronouncement of the Utah Supreme Court:

> It is no excuse to say that the verdict was unanimous and since six of the eight jurors could find a verdict, the error [in failing to remove a juror for cause] was harmless. By exercising one

> of their peremptory challenges upon this prospective juror, plaintiffs had only two remaining. The juror which remained because the plaintiffs had no challenge to remove him may have been a hawk amid seven doves and imposed his will upon them.

Crawford v. Manning, 542 P.2d 1091, 1093 (Utah 1975). This long-established rule of automatic prejudice, see Woolley, 810 P.2d at 440, was supported by no cited authority in the Crawford opinion.

Worse, in establishing the automatic prejudice rule, the Utah Supreme Court overlooked or ignored its own longstanding precedent: "This contention that prejudice is presumed from an erroneous ruling in a challenge for cause when all peremptory challenges have been exhausted was raised by appellants in the case of State v. Thorne, 41 Utah 414, 426, 126 P. 286, 291 [(1912)], and was overruled." Van Wagoner v. Union Pac. R. Co., 112 Utah 189, 196-99, 186 P.2d 293, 297 (1947) (emphasis added). Accord State v. Bautista, 30 Utah 2d 112, 514 P.2d 530 (1973); State v. Cano, 64 Utah 87, 228 P.2d 563 (1924). The Van Wagoner and Thorne opinions were supported by extensive analysis and citation to authorities, and supported the principle that a convicted defendant who complains of a biased jury must support that complaint with proof. See Thorne, 41 Utah at 426-27, 126 P. at 291-92. Accord Ross v. Oklahoma, 487 U.S. 81, 86, 108 S. Ct. 2273, 2277 (1988).

Seen in this light, the Crawford v. Manning automatic prejudice rule appears very unsound. The State hopes to persuade

the supreme court to overrule it.[14] In any event, the rule's application should be strictly limited to those cases where a for-cause juror challenge is made in the trial court, preserving the issue for appellate review. "More than mere speculation is required to support a charge of lack of jury impartiality on appeal." State v. Jones, 823 P.2d 1059, 1062 (Utah 1991). As fanciful speculation, at best, of prejudicial jury selection error, the Crawford rule should never be applied in a case like this one, where no trial-level, for-cause juror challenge has preserved the issue for appellate review.[15]

In sum, defendant has proven neither obvious error nor resulting prejudice to him, in the trial court's handling of the jury selection process. Accordingly, he has not established

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[14]The Crawford rule recently led to reversal of a capital homicide conviction in State v. Young, No. 890424, slip op. at 17-18, 99-101 (Utah March 17, 1993). There three justices found "clear error" in the trial court's refusal to remove one juror for cause, see id. at 99, where a peremptory challenge had been used to remove the juror. More stringent scrutiny of jury selection may be justified in capital cases. Even so, one of the Young majority justices commented that "in voting to reverse defendant's conviction, no member of this court has suggested that he is innocent of the appalling crime of which he was convicted or that the commission of that crime by one with defendant's past record of violent crime cannot be punished by death." Id. at 134 (Zimmerman, J., concurring and dissenting).

[15]The Crawford "hawk amid seven doves" metaphor is also curious. It implies that litigants are somehow entitled to a jury composed solely of "doves" who, like their pigeon cousins, might be trained or conditioned to perform certain simple tricks. "Hawks," meanwhile--alert, independent, and perceptive, are to be avoided. This seems cynical and inappropriate, particularly in a democratic society composed of both "doves" and "hawks:" both groups should be represented on juries.

"plain error" in that process, and is not entitled to a reversal of his conviction.

B. Effective Assistance of Counsel.

Defendant alternatively argues that his trial-level waiver of jury selection issues should be overcome by the doctrine of "ineffective assistance of counsel," as set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). By waiving deeper voir dire "probing," and not raising more for-cause juror challenges, defendant argues, his trial counsel performed in a prejudicially deficient fashion.

This Court has recognized that "plain error" and "counsel ineffectiveness" arguments, raised for the first time on appeal, share "a common standard." State v. Ellifritz, 835 P.2d 170, 174 (Utah App. 1992) (quoting State v. Verde, 770 P.2d 116, 124 n.15 (Utah 1989)). Like plain error, counsel ineffectiveness entails a two-element, "error plus resulting harm" test.

The "error" element of counsel ineffectiveness is framed as "deficient performance." To prove this element, the defendant must overcome a "strong presumption" of competent performance, and prove that trial counsel seriously blundered, in a manner that falls outside "the wide latitude counsel must have in making tactical decisions." Strickland, 466 U.S. at 688-89. The "resulting harm" or "prejudice" element is the same as for plain error: the defendant must show that but for counsel blunder(s), there is a reasonable likelihood that the verdict would have been more favorable. Ellifritz, 835 P.2d at 174. As

with plain error, the defendant must normally prove both elements. Strickland, 466 U.S. at 690, 696, 104 S. Ct. at 2066, 2069; Verde, 770 P.2d at 118-19 & n.2.

Because the plain error and counsel ineffectiveness tests so closely resemble one another, the State's plain error analysis also applies to counsel ineffectiveness. Accordingly, the State incorporates that analysis, without repetition, into its argument that trial counsel performed effectively on defendant's behalf. As follows, the State adds some additional observations in support of this argument, and in defense of trial counsel's performance.

1. No Deficient Counsel Performance.

Trial counsel did not blunder his way through jury selection. Instead, the record reflects that he was fully involved in voir dire, and reasonably exercised his juror challenge rights.

Counsel himself questioned the panelists, stressing their duty to acquit defendant if the "beyond a reasonable" doubt standard were not met (R. 312). Similarly, during in-chambers voir dire, counsel followed up on panelist Geurts's indirect contacts with the prosecutor (R. 315), panelist Trump's experiences as a robbery victim and a lineup witness (R. 317-19), and panelist Ludlow's experience as a victim of both violent crime and burglary (R. 320-21). After voir dire, counsel's consensus agreement with the court and prosecutor, to remove panelist Ludlow for cause, was appropriately based upon Ludlow's

admission that her impartiality was doubtful (R. 321, 324). See Ellifritz, 835 P.2d at 173 (counsel and court cooperatively decided juror challenges; ineffectiveness claim rejected).

Counsel was not required to aggressively "probe" every juror who had any sort of experience as a crime victim, as his present counsel advocates. See Jones, 823 P.2d at 1063 ("This Court will not review counsel's tactical decisions simply because another lawyer, e.g., appellate counsel, would have taken a different course"). Nor was he required to challenge those jurors, either for cause or peremptorily, because counsel need not raise every available objection in order to perform competently. See, e.g., State v. Colonna, 766 P.2d 1062, 1066-68 (Utah 1988) (no deficient performance where "it was conceivable" that objections were foregone as part of strategy). Counsel also had professional latitude to remove certain panelists with peremptory challenges, rather than through for-cause challenges. See Ellifritz, 835 P.2d at 176-77 (counsel permissibly waived one peremptory challenge, and used others to remove three panelists assailed "for cause" on appeal).

In fact, aggressive "probing" of prospective jurors might itself cause the very harm it purports to prevent, by annoying the panelists and prejudicing them against the "probing" counsel's case. The prosecutor engaged in only minimal "probing" here. Trial defense counsel also limited his voir dire, except in those instances when bias seemed most likely, and thereby

limited the likelihood of actually causing harmful jury bias. This was competent performance.

As a policy matter, this Court should hold a very hard line against overcoming trial-level waiver of legal issues via "ineffective counsel" appellate arguments. Regarding jury selection, the Texas Court of Criminal Appeals has refused to find deficient performance in trial counsel's decision to seat a juror who affirmatively declared a bias in favor of the prosecution. See Delrio v. State, 840 S.W.2d 443, 444-45 (Texas Crim. App. 1992) (en banc) (juror was an ex-narcotics officer who knew the narcotics-offense defendant, and stated, "I couldn't be impartial, I'm saying"). The Texas court determined that some conceivable tactic might have underpinned this unusual decision; it also held that jury selection is subject to the same waiver principles as other legal issues. 840 S.W.2d at 445-46. The Texas court's holding also supports the principle that trial counsel ought not be permitted to plant the seeds of a later reversal, by appearing to perform "deficiently."

This Court alluded to such a policy concern in Ellifritz, 815 P.2d at 177. Citing State v. Bullock, 791 P.2d 155, 158-59 (Utah 1989), cert. denied, 497 U.S. 1024, 110 S. Ct. 3720 (1990), with respect to plain error, the Court observed that the practice of "invited error" would be supported unless stringent standards for appellate consideration of such claims were maintained. A similar policy concern is evident in Strickland, where the United States Supreme Court, expressing the

"profound importance of finality in criminal proceedings," reiterated that a showing of counsel ineffectiveness must be powerfully made. 466 U.S. at 693-94, 104 S. Ct. at 2068.

No such powerful showing has been made here. This Court may not like the jury selection approach that trial counsel took in this case. Nevertheless, this Court should recognize that counsel's approach was permissible, under the wide latitude that must be afforded to him.

2. No Resulting Harm.

Apparently conceding that he cannot affirmatively prove that trial counsel's alleged jury selection blunders harmed him, defendant asks this Court to relieve him of his normal burden under Strickland, and to presume prejudice (Br. of Appellant at 21). This would be a mistake.

Strickland sets forth but two instances in which counsel blunder must give rise to a presumption of prejudice. Prejudice is presumed when counsel assistance is effectively denied altogether, or when the state itself interferes with counsel's ability to function. 466 U.S. at 692, 104 S. Ct. at 2067. There is a "more limited" presumption of prejudice when counsel has a conflict of interest with the defendant. Id. (quotations and citations omitted). None of these things happened here: trial counsel was unimpeded by the State, and acted solely on defendant's behalf.

In urging this Court to expand the exceptions to the normal rule that defendants must affirmatively prove that

counsel's blunder caused harm, defendant relies upon Presley v. State, 750 S.W.2d 602 (Mo. App.), cert. denied, 488 U.S. 975, 109 S. Ct. 514 (1988). Presley involved counsel's failure to challenge, either for cause or peremptorily, a juror who clearly stated that he would be "partial to the state." 750 S.W.2d at 604, 607. No such admittedly biased persons sat on the jury that tried this defendant. Thus Presley, not controlling in any event, would not support a presumption of prejudice here, even if it were held that counsel unreasonably failed to further probe or challenge certain jurors.

People v. Wagner, 104 A.D.2d 457, 479 N.Y.S.2d 66 (App. Div. 2 Dept. 1984), also relied on by defendant, is a case where nine of twelve jurors had close police contacts, the trial turned on officer testimony, and counsel failed to investigate those contacts. 104 A.D.2d at 68. This error, resulting in a jury said to resemble "a miniature police force," id., was but one of many "derelictions" of trial counsel. Id. at 69. Similarly, Mason v. State, 289 Ark. 299, 712 S.W.2d 275 (1986), involved multiple counsel blunders not limited to jury selection. Neither opinion suggests, however, that the reviewing court applied any presumption of resulting harm. Wagner and Mason, then, do not help defendant.

Application of a presumption of prejudice to counsel miscues in jury selection would also be poor policy. There may be any number of other cases in which, upon review of cold transcripts, belated attacks on counsel's jury selection

performance might be made. By presuming harm in such cases, the waiver rule--which clearly applies to jury selection, see Utah R. Crim. P. 18(c)(2), would effectively be swallowed by its "counsel ineffectiveness" exception. Instead, the finality of trial court judgments should be supported, by upholding the waiver rule against jury selection challenges that are raised for the first time on appeal.[16]

The burden to show actual harm from counsel blunders in jury selection, then, properly rests with defendant, as does the burden of proving that actual blunders were made. Having failed to carry either burden, defendant's allegation of trial counsel ineffectiveness should be rejected.

POINT TWO

DEFENDANT WAS PROPERLY CONVICTED OF BOTH AGGRAVATED ROBBERY AND AGGRAVATED BURGLARY.

Defendant makes another argument, also unpreserved by trial-level objection, that he could not be convicted of both

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[16]Sounder Utah cases finding reversible error in preserved jury selection issues have been those in which the challenged jurors acknowledged actual bias. See, e.g., State v. Jones, 734 P.2d 473, 474 (Utah 1987) (two jurors admitted that they would be affected by close ties to murder victim's family); State v. Hewitt, 689 P.2d 22, 26 (Utah 1984) (juror expressed bias for prosecution and stated, "In essence, I would prefer not to be here"); State v. Brooks, 631 P.2d 878, 884 (Utah 1981) (two jurors "expressed strong feelings of anger and frustration" as victims of crimes similar to that being tried); Jenkins v. Parrish, 627 P.2d 533, 535-36 (Utah 1981) (juror admitted tendency to believe defendant physician in malpractice suit); State v. Bailey, 605 P.2d 765, 766 (Utah 1980) (two jurors agreed that police testimony could be relied upon "to the utmost"); Crawford v. Manning, 542 P.2d 1091, 1092 (Utah 1975) (juror in wrongful death action expressed "strong feelings" about trying to recover money for the death of another). Again here, no such admittedly-biased jurors were allowed to sit.

aggravated robbery and aggravated burglary. This argument, essentially that the burglary was a lesser included offense within the robbery, should be summarily rejected.

This Court need consider neither plain error nor counsel ineffectiveness as bases for overcoming defendant's trial-level waiver of this argument. Had defendant objected to either the dual charges or the dual convictions in the trial court, the objection would have been correctly denied. Under Utah Code Ann. § 76-6-301(1) (1990), robbery includes the element of "taking of personal property" through force or fear. The act of "taking" is not part of the offense of burglary.[17]

Burglary, however, defined under Utah Code Ann. § 76-6-202 (1990), does include an element that is not part of the robbery definition: the act of "enter[ing] or remain[ing] in a building" with criminal intent. The Utah Supreme Court has squarely rejected defendant's argument that "remaining" is not an "act" for the purposes of the burglary statute. See State v. Bradley, 752 P.2d 874, 876 (Utah 1985, amended on rehearing 1988). Accordingly, once defendant wore out his welcome in the Vert home by threatening and handcuffing Stephanie Vert within the home, he committed burglary. See id. Then, when he took

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[17]The "aggravating" element for aggravated robbery and aggravated burglary is quite similar, that is, the possession or use of a "dangerous weapon" in the course of the offense. Utah Code Ann. §§ 76-6-203, 76-6-302 (1990). Therefore, the State analyzes only the simple robbery and simple burglary statutes for the purpose of this argument.

property from the home, an act accomplished with the aid of that threat and assault, defendant committed robbery.

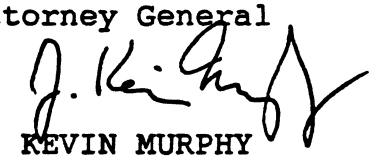
In short, the offenses of aggravated robbery and aggravated burglary, while overlapping, each contain an element not found within the other. This makes them separate criminal offenses, for which defendant was properly tried and convicted, even though they were committed during a "single criminal episode," under Utah Code Ann. § 76-1-402 (1990). See State v. Eichler, 584 P.2d 861, 863 (Utah 1978) (robbery and kidnapping during same episode: both convictions affirmed); State v. Jones, 13 Utah 2d 35, 368 P.2d 262 (1962) (burglary and theft (then larceny) during same episode: both convictions affirmed); Duran v. Cook, 788 P.2d 1038 (Utah App. 1990) (same). Defendant's argument to the contrary, which ignores controlling legal precedent, is therefore meritless.

CONCLUSION

Our adversary system of justice did not fail this defendant. He received a fair trial, and the convictions resulting from that trial should be affirmed.

RESPECTFULLY SUBMITTED this 26 day of March, 1993.

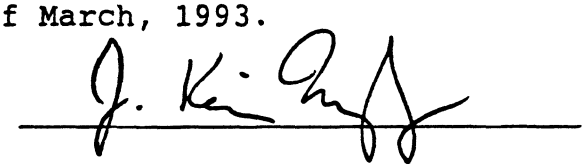
JAN GRAHAM
Attorney General



J. KEVIN MURPHY
Assistant Attorney General

CERTIFICATE OF MAILING

I certify that a true and accurate copy of the foregoing Brief of Appellee was mailed, postage prepaid, to ELIZABETH HOLBROOK, SALT LAKE LEGAL DEFENDER ASSOC., attorneys for defendant-appellant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 26 day of March, 1993.



APPENDIX I

Utah Jury Selection and Service Act

(copied from unannotated Utah Code, 1991),

and

Utah Constitution, Article V, section 1

request of the court of the other state a certified copy of the transcript of any court record and other documents mentioned in Section 78-45c-21. 1980

78-45c-23. Foreign countries — Application of general policies.

The general policies of this act extend to the international area. The provisions of this act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons. 1980

78-45c-24. Priority on court calendar.

Upon the request of a party to a custody proceeding which raises a question of existence or exercise of jurisdiction under this act the case shall be given calendar priority and handled expeditiously 1980

78-45c-25. Notices — Orders to appear — Manner of service.

(1) Whenever the terms of this act impose a duty upon the court to notify a party or court of a particular fact or action, such notification may be accomplished by the clerk of the court or a party to the action upon order of the court.

(2) Orders of the court for parties or persons to appear before the court in accordance with the terms of this act shall include legal and sufficient service of process in accordance with the Utah Rules of Civil Procedure unless otherwise ordered for good cause shown. 1980

78-45c-26. Short title.

This act may be cited as the "Utah Uniform Child Custody Jurisdiction Act." 1980

CHAPTER 45d

CHILD SUPPORT COLLECTION

(Repealed by Laws 1988, ch. 1, § 407.)

78-45d-1 to 78-45d-13. Repealed.

PART V

JURORS

CHAPTER 46

GENERAL PROVISIONS

Section

78-46-1. Short title.

This act shall be known and may be cited as the "Jury Selection and Service Act." 1978

78-46-2. Jurors and grand jurors selected from random cross section — Opportunity and obligation to serve.

It is the policy of this state that persons selected for jury or grand jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with this chapter to be considered for service and have the obligation to serve when summoned for that purpose. 1980

78-46-3. Discrimination prohibited.

A citizen shall not be excluded or exempt from jury service on account of race, color, religion, sex, national origin, or economic status. 1978

78-46-4. Definitions.

(1) "Clerk" or "clerk of the court" means the person so designated by title and includes any deputy clerk.

(2) "Court" means trial courts, and includes, when the context requires, any judge or justice of the court.

(3) "Grand jury" means a body of seven persons selected from the citizens of a particular county before a court of competent jurisdiction and sworn to inquire into public offenses committed or triable within the county.

(4) "Jury" means a body of persons temporarily selected from the citizens of a particular county invested with power to present and indict a person for a public offense, or to try a question of fact.

(5) "Jury wheel" means any physical device or electronic system for the storage of the names or identifying numbers of prospective jurors.

(6) "Master jury wheel" means the jury wheel in which are placed names or identifying numbers of prospective jurors taken from the master list pursuant to this act.

(7) "Master list" means the primary and secondary source lists as prescribed by the Judicial Council under Section 78-46-10.

(8) "Official register of voters" means the book maintained for each voting district containing the names of persons registered to vote within the voting district in the most recent general election.

(9) "Qualified jury wheel" means the jury wheel in which are placed the names or identifying numbers of prospective jurors whose names are drawn at random from the master jury wheel and are determined to be qualified to serve as jurors.

(10) "Trial jury" means a body of persons selected from the citizens of a particular county before a court or officer of competent jurisdiction, and sworn to try and determine by verdict a question of fact. 1988

78-46-5. Number of trial jurors.

(1) A trial jury in capital cases shall consist of twelve jurors.

(2) A trial jury in district court in noncapital criminal or civil cases shall consist of eight jurors; provided that in misdemeanor and civil cases the jury may consist of any number less than eight upon which the parties may agree in open court.

(3) A trial jury in a circuit or justice court shall consist of six jurors in a class A misdemeanor trial, and in other criminal or civil cases the trial jury shall consist of four jurors or of any number less than four upon which the parties may agree in open court.

(4) A trial jury in a juvenile court shall consist of four jurors. 1979

78-46-6. Alternate trial jurors — Selection — Duties and function.

(1) At the commencement of a felony trial when the court believes the trial may be long, the judge may cause an entry to that effect in the minutes, and immediately after the jury is impanelled and sworn, direct the calling of one additional juror to be known as "alternate juror."

(2) The alternate juror shall be drawn from the same source, in the same manner and have the same qualifications, be subject to the same examination and challenges as the jurors already sworn; provided, that each party is entitled to one peremptory challenge to the alternate juror.

(3) The alternate juror shall be seated near, and have equal facilities for seeing and hearing the proceedings and shall take the same oath as the jurors already selected. The alternate juror must attend the trial at all times in company with the other jurors and shall obey the orders and be bound by the admonition of the court at each adjournment. If the regular jurors are ordered to be kept in the custody of the sheriff during the trial, the alternate shall be kept with the other jurors, and, except as herein provided, shall be discharged when the case is submitted to the jury.

(4) If a juror dies or becomes ill and is unable to perform juror duties prior to the final submission of the case to the jury, the court may order the alternate juror to assume the juror's place in the jury box. The alternate juror is subject to the same rules and regulations as the original jurors. 1979

78-46-7. Persons competent to serve as jurors.

(1) A person is competent to serve as a juror if the person is:

(a) a citizen of the United States;

(b) over the age of 18 years;

(c) a resident of the county; and

(d) able to read, speak, and understand the English language.

(2) In municipalities which are not primary or secondary locations for the circuit court, a person is not competent to serve as a juror in cases involving the violation of a municipal ordinance unless the person, in addition to meeting the requirements listed in Subsection (1), resides within the municipality whose ordinance is alleged to have been violated or, in the case of a municipality with a population of fewer than 3,000 persons, resides within 15 miles of the municipality. 1988

78-46-8. Determination on juror qualification — Persons not competent to serve as jurors.

(1) The court, on its own initiative or when requested by a prospective juror, shall determine whether the prospective juror is disqualified from jury service. The court shall base its decision on the information provided on the juror qualification form, or by interview with the prospective juror or other competent evidence. The clerk shall enter the court's determination on the juror qualification form and on the alphabetical list of names drawn from the master jury wheel.

(2) The following persons are not competent to serve as jurors:

(a) a person who has been convicted of a felony;

(b) a person serving on active duty in the military service of the United States;

(c) a person who is not capable because of physical or mental disability of rendering satisfactory jury service. Any person who claims this disqualification may be required to submit a physician's certificate verifying the disability and the certifying physician is subject to inquiry by the court at its discretion; or

(d) a person who does not meet the requirements of Section 78-46-7. 1979

78-46-9. Repealed. 1988

78-46-10. Master list maintained by county clerk — Public examination — Lists used in compiling master list available to county clerk.

(1) The county clerk for each county shall maintain the master list, which shall be open to the public for examination.

(2) The person having custody, possession, or control of any list used in compiling the master list, including any sources designated by the Judicial Council as supplementary sources, shall make the list available to the county clerk at all reasonable times. 1988

78-46-11. Master jury wheel — Selection of names to put in jury wheel — Certification of names.

(1) A master jury wheel shall be maintained by each county in the office of the county clerk. The county clerk shall place the names or identifying numbers of prospective jurors taken from the master list into the jury wheel. The jury wheel shall be emptied and refilled in December each year pursuant to this act.

(2) The number of names to be selected by the county clerk shall be determined by the judge or

judges of the district court for the county. Names shall be selected, as far as practical, from each of the voting districts within the county in proportion to the number of voters within each voting district. Names shall be selected in a random but uniform pattern designed to select names from each entire list of names contained in the master list of the county. The name of any person selected may not be excluded by the county clerk except if the county clerk knows the person to be deceased.

(3) The name and address of each person selected shall be certified by the county clerk and immediately placed in the master jury wheel. 1989

78-46-12. Drawing prospective juror names from master wheel — Juror qualification form — Content — Completion — Penalties for failure to complete or misrepresentation — Joint jury wheel for court authorized.

(1) From time to time and as prescribed by the district court, the county clerk shall draw as many names from the master jury wheel as the district, circuit, justice, or juvenile courts by order determine, shall alphabetize the list of names drawn, and shall furnish it to the court for which drawn. The names drawn may not be disclosed to any person other than pursuant to this act or by specific order of the court.

(2) The clerk of the court for which prospective juror names are furnished shall mail each prospective juror a juror qualification form and instructions to complete the form and return it by mail to the clerk within ten days after it is received.

(3) (a) The juror qualification form is subject to approval by the district court as to matters of form. It shall elicit the name, address, and age of the prospective juror and if the person:

(i) is a citizen of the United States;

(ii) is a resident of the county;

(iii) is able to read, speak, and understand the English language;

(iv) has any physical or mental disability impairing the person's capacity to render jury service;

(v) has ever been convicted of a felony; or

(vi) is on active duty in the military service of the United States.

(b) The form shall contain the person's declaration that the responses are true to the best of the person's knowledge. It shall also include a statement that a willful misrepresentation of a material fact may be punished upon conviction by a fine of not more than $500 or imprisonment for not more than 30 days or both. Notarization of the form is not required.

(4) If a person receives a juror qualification form and is not able to complete it, another person may do so and he shall indicate the form has been completed for the person to whom it was sent, the name of the person completing the form, and the reason for his completing the form.

(5) If it appears there is an omission, ambiguity, or error in a returned form the clerk shall return the form to the prospective juror with instructions to make the necessary addition, clarification, or correction and to return the form to the clerk within ten days after it is received.

(6) Any prospective juror who fails to return a completed form as instructed shall be directed by the court to immediately appear before the clerk to complete the form. A person who fails to appear is subject to the procedures and penalties in Section 78-46-20.

(7) Any person who willfully misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror is guilty of a misdemeanor and upon conviction may be fined not more than $500 or imprisoned not more than 30 days, or both.

(8) The names of all qualified jurors obtained from the list shall be placed in the qualified jury wheel maintained by each court and shall constitute the court's source of jurors for a period of time the judges of the court determine.

(9) Judges of the district court and of any circuit court within the district may by agreement establish a joint qualified jury wheel from which jurors required by both courts may be drawn or pooled. 1989

78-46-13. Drawing juror panels — Notice to jurors — Procedure when shortage of jurors drawn — Public inspection of names drawn and content of qualification forms — Exception.

(1) Jury panels shall be drawn from the qualified jury wheel as needed or ordered by the court.

(2) A judge of any court may direct the clerk of that court to draw and assign the number of qualified jurors the judge deems necessary for one or more jury panels. The clerk shall draw at random from the qualified jury wheel the number of qualified jurors specified. The qualified jurors drawn for jury service shall be assigned at random by the clerk to each jury panel in a manner prescribed by the court.

(3) If a grand or trial jury is ordered to be drawn, the clerk shall cause each person drawn for jury service to be notified when and where the juror is to report for service. The notice may be given by telephone or by service of a summons, either personally or by first class mail which is addressed to the juror's usual residence, business, or post office address.

(4) If there is an unanticipated shortage of available trial jurors drawn from a qualified jury wheel, the court may require the clerk of the court to summon a sufficient number of trial jurors selected at random by the court from the qualified jury wheel.

(5) The names of qualified jurors drawn from the qualified jury wheel and the contents of jury qualification forms shall be made available to the public unless the court determines in any instance that this information, in the interest of justice, should be kept confidential or its use limited in whole or in part. 1986

78-46-14. Qualified prospective jurors not exempt from jury service.

No qualified prospective juror is exempt from jury service. 1979

78-46-15. Excuse from jury service.

(1) The court, upon request of a prospective juror or on its own initiative, shall determine on the basis of information provided on the juror qualification form or by interview with the prospective juror, or by other competent evidence, whether the prospective juror should be excused from jury service. The clerk shall enter this determination in the space provided on the juror qualification form.

(2) A person may be excused from jury service by the court, at its discretion, upon a showing of undue hardship, extreme inconvenience, or public necessity for any period the court deems necessary. 1979

78-46-16. Jury not selected in conformity with chapter — Procedure to challenge — Relief available — Exclusive remedy.

(1) Within seven days after the moving party dis-

covered, or by the exercise of diligence could have discovered the grounds therefore, and in any event before the trial jury is sworn to try the case, a party may move to stay the proceedings or to quash an indictment, or for other appropriate relief, on the ground of substantial failure to comply with this act in selecting a grand or trial jury.

(2) Upon motion filed under this section containing a sworn statement of acts which if true would constitute a substantial failure to comply with this act, the moving party may present testimony of the county clerk, the clerk of the court, any relevant records and papers not public or otherwise available used by the jury commission or the clerk, and any other relevant evidence. If the court determines that in selecting either a grand or a trial jury there has been a substantial failure to comply with this act and it appears that actual and substantial injustice and prejudice has resulted or will result to a party in consequence of the failure, the court shall stay the proceedings pending the selection of the jury in conformity with this act, quash an indictment, or grant other appropriate relief.

(3) The procedures prescribed by this section are the exclusive means by which a person accused of a crime, the state, or a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with this act. 1969

78-46-17. Preservation of records and papers by county clerk.

All records and papers compiled and maintained by the county clerk in connection with the selection and service of jurors shall be preserved by the clerk for four years after the master jury wheel used in the selection is emptied and refilled and for any longer period ordered by the court. 1969

78-46-18. Compensation and travel expenses of jurors.

A juror shall be compensated at the rate of $17. However, if he travels more than 50 miles, he shall be paid 25 cents a mile under Subsection 21-5-4(4) for the distance in excess of 50 miles in going only for each day of required attendance at sessions of the court. 1969

78-46-19. Limitations on jury service.

In any two-year period a person shall not be required:

(1) to serve on more than one grand jury;

(2) to serve as both a grand or trial juror; or

(3) to attend court for prospective jury service as a trial juror more than 10 court days, except if necessary to complete service in a particular case. 1979

78-46-20. Penalties for failure to appear or complete jury service.

A person summoned for jury service who fails to appear or to complete jury service as directed shall be ordered by the court to immediately appear and show cause for failure to comply with the summons. Any person who fails to show good cause for noncompliance with the summons is guilty of criminal contempt and may be fined not more than $100 or imprisoned not more than three days, or both. 1979

78-46-21. Employer not to discharge or threaten employee for jury service — Criminal penalty — Civil action by employee.

(1) An employer may not deprive an employee of employment or threaten or otherwise coerce the employee regarding his employment because the employee receives a summons, responds to it, serves as a juror, or a grand juror, or attends court for prospective jury or grand jury service.

(2) Any employer who violates this section is guilty of criminal contempt and upon conviction may be fined not more than $500 or imprisoned not more than six months, or both.

(3) If any employer discharges an employee in violation of this section, the employee within 30 days may bring a civil action for recovery of wages lost as a result of the violation and for an order requiring the reinstatement of the employee. Damages recoverable may not exceed lost wages for six weeks. If the employee prevails, the employee shall be allowed a reasonable attorney's fee fixed by the court. 1969

78-46-22. Repealed. 1969

78-46-23. Court administrator's duties and responsibilities.

If any court establishes the office of a court administrator, the court may by order provide that the responsibilities given to the court or court clerk by this act may be assigned to and performed by the court administrator. 1979

CHAPTERS 47 TO 50

RESERVED

PART VI

ATTORNEYS AND COUNSELORS

CHAPTER 51

GENERAL PROVISIONS

ARTICLE V

DISTRIBUTION OF POWERS

Section
1. [Three departments of government.]

Section 1. [Three departments of government.]

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

History: Const. 1896.

Cross-References. — Executive department, Utah Const., Art. VII.

Judicial department, Utah Const., Art. VIII.

Legislative department, Utah Const., Art. VI.

Municipal powers not delegable, Utah Const., Art. VI, § 28.

APPENDIX II

Transcript of Pertinent Portions of Juror Voir Dire

(focusing on Barber, Pike, Heap, Ludlow, Trump, and Pickering)

County on or about January 29, 1991; in that the Defendant Corey Lynn Brooks unawfully and intentionally took personal property in the possession of Stephanie A. Vert with the use of a firearm.

He is charged by Count II with Aggravated Burglary, a First Degree Felony, at 3816 West 3240 South in Salt Lake County on or about January 29, 1991, in that the defendant, Corey Lynn Brooks entered and remained unlawfully in the dwelling of Stephanie A. Vert with the intent to commit a theft by threatening the immediate use of a handgun.

Are there any of you who are acquainted with this criminal episode as I've outlined it to you?

Are there any of you who have any pressing or urgent business or personal matters over the next four days that would prevent you from providing satisfactory jury service over the next four days?

Your name?

A JUROR: My name is Frank L. Barber.

THE COURT: Frank what?

A JUROR: Barber, B-a-r-b-e-r.

THE COURT: What is your problem?

A JUROR: Since I qualified for the jury

list my wife has had knee surgery and I'm required to take her for therapy three times a week, Monday, Wednesdays and Fridays at 5:00 o'clock in Sandy.

THE COURT: Could other arrangements be made?

A JUROR: I have been unable to so far.

THE COURT: You are working on it?

A JUROR: Well, she has until -- a week from today she goes in to the doctor to see if the therapy has been successful.

THE COURT: I understand. But the question was: Is there any other possibility to work out other arrangements?

A JUROR: I don't have anyone I could trust with her.

THE COURT: What time are the therapy sessions?

A JUROR: Therapy is at 5:00 p.m.

THE COURT: You haven't called the therapist to see if that could be moved back 20 or 30 minutes?

A JUROR: No I haven't.

THE COURT: Ordinarily, we are in recess. So, if you are selected, the Court would appreciate having you see if that -- the time could be

changed; and we'd recess in time enough to allow you to do that. Given that accommodation, do you feel that could you serve?

A JUROR: I am not sure that I could devote my undivided attention to the case under the circumstances.

THE COURT: Thank you.

Your name?

A JUROR: Gary G. Pickering. As I stated before, I'm a Jehovah's Witness. It is not a precedent. It is kind of a gray matter among our organization. I've given it a great amount of thought, weighing what scriptures seem to make people go in different directions on that. And my conscience makes me feel that I shouldn't do that. And I want the Court to know that up-front because of time efficiency.

THE COURT: I understand.

"As jurors, it is your function to find the facts in a given case. It's the Court's function to act as the umpire, basically, and assure that the trial is tried within the framework of the Rules of Criminal Procedure and Rules of Evidence, and instruct the jury on the law.

"Are you all willing to accept the

A JUROR: Education.

THE COURT: Did you work outside of the home?

A JUROR: No.

THE COURT: What did your husband do for a living?

A JUROR: He was the Murray City Treasurer.

THE COURT: Is he retired?

A JUROR: Yes, he is retired.

THE COURT: And have you ever been on prior jury service?

A JUROR: No, I haven't.

THE COURT: Have you been in court as a party or a witness?

A JUROR: No.

THE COURT: This is your first experience?

A JUROR: Yes.

THE COURT: Thank you.

A JUROR: My name is Larry Pike. My wife's name is Mary Ann Pike. We have two children, ages 15 and 10; both boys. I'm an electrical engineer. I have a master's degree from the University of Oklahoma. My wife works for Federal

Express in their sales office.

THE COURT: Have you been on a jury before?

A JUROR: I have served on a federal jury, yes.

THE COURT: How long ago?

A JUROR: Oh, eight to ten years.

THE COURT: Do you remember the judge?

A JUROR: No, I don't.

THE COURT: Here in Salt Lake?

A JUROR: Yes, it was.

THE COURT: Do you remember the kind of case or cases you were involved in?

A JUROR: Yes, it involved firearms; not robbery or burglary, just possession.

THE COURT: A criminal charge?

A JUROR: Yes.

THE COURT: Do you recall whether there was an acquittal or a conviction?

A JUROR: We found him guilty.

THE COURT: Did you serve on more than one jury?

A JUROR: No, just one.

THE COURT: Have you been in court as a party or a witness?

A JUROR: No, I have not.

THE COURT: Other than that, you've only had the one court experience?

A JUROR: That's correct.

THE COURT: Thank you.

A JUROR: My name is Shane Peck. I'm single. I have no kids. I am a cook at Bulwinkle's Bar & Grill. I've never served on jury duty.

THE COURT: Have you been in court as a party or a witness?

A JUROR: No.

THE COURT: What is your education?

A JUROR: I'm a cook at Bulwinkle's Bar & Grill.

THE COURT: What is your schooling?

A JUROR: Haven't graduated yet.

THE COURT: All right. Thank you.

A JUROR: My name is Daniel R. Heap. My wife is Evelyn. I have two kids that are both married now; one is 23 and 21. I work for Salt Lake County Fleet Maintenance for the last 20 years.

THE COURT: Your education?

A JUROR: High school education plus two years of trade tech.

THE COURT: Does your wife work outside

the home?

A JUROR: Yes, she does.

THE COURT: What kind of work?

A JUROR: She is a photofinisher.

THE COURT: Have you been on a jury before?

A JUROR: No.

THE COURT: Have you been in court as a party or a witness?

A JUROR: No.

THE COURT: This is your first experience?

A JUROR: Yes.

THE COURT: Thank you.

A JUROR: My name is Alta Ludlow. I am a waitress at Grubstake Restaurant in Park City. My husband's name is Mike Ludlow. He works at Deer Valley Resort as the Auxilliary Services Manager. We have a three-and-a-half-year-old daughter. I have never served jury duty. And I have a high school graduation.

THE COURT: Have you been in court as a party or a witness.

A JUROR: No.

THE COURT: Thank you.

A JUROR: My name is Phyllis Geurts, and my husband's name is Arthur Geurts. We have eight children; the youngest is 18, and the oldest is 34. I have one year of college. I've been a stay-at-home mother all these years. I've never served on a jury before.

And what was the other question?

THE COURT: Have you been in court as a party or a witness?

A JUROR: No, I haven't.

THE COURT: What does your husband do for a living?

A JUROR: He is retired from the State of Utah. He does consulting in engineering out of the home.

THE COURT: What did he do when he worked?

A JUROR: He was a traffic and safety engineer.

THE COURT: Thank you.

A JUROR: My name is Karen Hall, and I'm single. I'm employed at Surety Life Insurance as a Quality Verification Clerk. I've never served on jury duty.

THE COURT: Have you been in court as a

haven't been on jury duty before or as a witness.

THE COURT: This is the first time in court?

A JUROR: Yes.

THE COURT: What was your education?

A JUROR: 12th grade.

THE COURT: What did your husband do for a living?

A JUROR: He's unemployed, medically.

THE COURT: Thank you.

A JUROR: My name is Frank Barber. My wife's name is Ruth. She retired seven years ago from JC Penny's as a Floor Supervisor. I work for Evans & Sutherland Computer Corporation as a Manufacturing Engineer. I have an Engineering Degree from UCLA. I've never served on jury duty.

THE COURT: Have you been in court as a party or a witness?

A JUROR: No, sir.

THE COURT: Thank you.

THE COURT: How about children, do you have --

A JUROR: I have two children; one 46 and one 39.

THE COURT: Thank you.

A JUROR: This has probably been 24 years ago. I remember.

THE COURT: Okay.

A JUROR: My little boy was a baby.

THE COURT: Thank you.

A JUROR: My name is Debra Trump. My husband is Darrell Trump. I work at U.S. -- no, I work at First Interstate Bank, and my husband is going to the U of U in Business Finance. We have four children; 11, 9, 5 and four months.

THE COURT: Your education?

A JUROR: One year of college.

THE COURT: Have you been on a jury before?

A JUROR: No, just two weeks ago they called.

THE COURT: Have you been in court as a party or a witness?

A JUROR: I have been a witness.

THE COURT: What kind of case?

A JUROR: Robbery.

THE COURT: How long ago did this occur?

A JUROR: Eight years ago.

THE COURT: Did that go to trial?

A JUROR: We just came in to pick him

out of a lineup.

THE COURT: And were you involved subsequent to the lineup?

A JUROR: No.

THE COURT: You don't know whether that resulted in a plea agreement or a trial?

A JUROR: He pleaded guilty.

THE COURT: Any other court experience?

A JUROR: Yes. At the bank I caught a forgery and had to pick him out of a lineup.

THE COURT: He pleaded guilty?

A JUROR: Pleaded guilty.

THE COURT: Any other court experience?

A JUROR: That's it.

THE COURT: Thank you.

A JUROR: My name is Rae Christensen. I am a retired teacher of 21 years; 19 of them teacher of physically handicapped. My husband is a retired mail carrier. He died from Alzheimer's Dementia last year.

THE COURT: What was your education?

A JUROR: I have four years of elementary education.

THE COURT: And did you teach?

A JUROR: I taught 21 years; 19 of them

a law enforcement officer.

THE COURT: Your name?

A JUROR: Elaine Olsen.

A JUROR: Brenda Rhodes. My cousin's husband is a policeman.

THE COURT: Your name?

A JUROR: Karen Carlyle. I have a retired uncle who was a policeman.

THE COURT: Anyone else?

A JUROR: My father-in-law, now, is the head of security for E-Systems.

THE COURT: Your name?

A JUROR: Alta Ludlow.

THE COURT: Anyone else?

A JUROR: My son was in the military police in the army.

THE COURT: Your name?

A JUROR: Rae Christensen.

THE COURT: Are there any of you who -- assault, generally, in a civil sense, is making a verbal threat with the apparent ability to carry out your threats. Battery, on the other hand, is ordinarily an inappropriate or offensive touching, so physical contact. Within that context, have there been any of you who have been physically or verbally

assaulted or battered?

Your name?

A JUROR: Alta Ludlow. Ten years ago I had a boyfriend try to throw me out of a two-story window.

THE COURT: Anyone else?

Have any of you had members of your family or close friends or associates that have been assaulted or battered?

Your name.

A JUROR: Rachel Roatcap. Three weeks ago my brother-in-law had his nose broken at a basketball game by a gang member.

THE COURT: Have there any -- here's a hand.

A JUROR: Brenda Rhodes. My neighbor was married to someone who tried to kill her.

THE COURT: Are there any of you who have been victims of a robbery?

A JUROR: Starting down on this end, Mr. Pickering?

A JUROR: On Main Street, here in Salt Lake -- just trying to think, put the years together. But my house was robbed of items.

THE COURT: Entry into your home?

A JUROR: They came into my home.

THE COURT: That's called a burglary.

A JUROR: I am sorry.

THE COURT: And items were taken?

A JUROR: Yes.

THE COURT: All right. We'll enlarge it to burglaries, as well, okay?

A JUROR: Yes --

THE COURT: Your name?

A JUROR: Marilyn Woodside. My battery and my CD radio were stolen --

THE COURT: Okay.

A JUROR: -- five or six years ago from my car.

THE COURT: Anyone else?

Your name?

A JUROR: Rae Christensen. My girlfriend was robbed. She lives in West Valley. This case does not involve Lucille Sorenson?

THE COURT: No.

A JUROR: I was robbed. I was working at U.S. Thrift & Loan, and at gunpoint, two men came in and made me get on the floor and robbed the bank.

THE COURT: And your name?

A JUROR: Debra Trump.

THE COURT: How long ago was that?

A JUROR: Eight and a half years ago.

THE COURT: All right.

Other people back in here? Your name?

A JUROR: Naomi Sandberg. My husband was hit in the back of the head with a rifle, and then hit in the mouth.

THE COURT: How long ago has that been?

A JUROR: About five years.

THE COURT: Thank you.

Anyone else? Mrs. Geurts?

A JUROR: On two different occasions we've had somebody walk in our unlocked back door and take my purse.

THE COURT: Okay.

A JUROR: When I was 13, our house was broken into, and they stole things.

THE COURT: Your name?

A JUROR: Alta Ludlow. No one was there. And then two and a half years ago, both mine and my husband's vehicles were broken into four times in one month; windows broke out, stereos taken, consoles broken up.

THE COURT: Anyone else?

A JUROR: I've had -- Daniel Heap. I've

had my house broke into before, and our vehicles twice in the last couple of years.

THE COURT: Thank you.

A JUROR: Larry Pike. As a child, our home was burglarized when we were there.

THE COURT: Anyone else?

If you or a member of your family were involved in a case such as the one before you, would you be willing to have your case or theirs tried by eight people in the same frame of mind as you are now in?

Possessing the state of mind that you have, is there anything that would prevent any of you from acting fairly and impartially without prejudice to the substantial rights of either party in this case?

Is there any reason known to any of you why you could not try the case fairly and impartially upon any evidence and without any bias for or against either party to the action? Other than Mr. Pickering, and you've indicated your feelings.

From your answers, I understand that each of you individually now declares to me that you can listen attentively to the evidence, can apply the law to the facts which you may find to exist and can

reach a verdict which is fair and impartial as to each party in this controversy. Are there any of you who for any reason feel that you cannot?

Does the State have any additional questions?

MR. BLAYLOCK: Your Honor, sometimes jurors for various reasons find it very difficult to sit in judgment over a fellow human being. And even if the evidence were such that it would be beyond a reasonable doubt, would find it difficult to convict somebody. If the Court could ask that question?

THE COURT: In our system, the juries find the facts. The business of punishment is handled by the Court or through of Department of Corrections. Are there any of you who have any difficulty sitting in judgment on another human being where the punishment could be incarceration in the Utah State Penitentiary, fine or other forfeiture?

Mr. Pickering.

Anyone else?

Any other questions?

MR. BLAYLOCK: I don't believe so, your Honor.

THE COURT: Do you pass the jury for cause?

MR. BLAYLOCK: If we could approach?

THE COURT: All right.

Does the defendants -- does the Defendant have any questions?

MR. PORTERFIELD: We do, your Honor. We would like to have the Court ask the members of the jury panel whether or not any of them would have difficulty acquitting a person if they were convinced that the State had not met its burden of proof beyond a reasonable doubt; although, they might be inclined to find that there was some evidence that a crime had been committed, and whether the members of the jury could make the distinction between proof beyond a reasonable doubt and that burden of proof which the State might present which meets that level of proof?

THE COURT: In our system, defendants are charged with crimes by a document we call an information. The fact that the Defendant stands charged of a crime creates no presumptions. You are to draw no inferences, therefrom. He has a presumption, constitutionally, that he is presumed to be innocent. The burden is upon the State of Utah to prove each and every element of the alleged crime beyond a reasonable doubt.

Would any of you, if not persuaded to

that level of conviction, have any difficulty acquitting a defendant in a case such as this?

A JUROR: I could not, Judge, your Honor.

THE COURT: All right, Mr. Pickering.

Any other questions, Mr. Porterfield?

MR. PORTERFIELD: I don't think so, your Honor. Thank you.

THE COURT: Would both attorneys approach the bench?

(Discussion off the record.)

THE COURT: We'll be in brief recess. I'll allow you to leave and go to the restroom. But remember to mark your chair with an "X" so you can keep track of where you are sitting. We need to keep you in the same order.

There's some of you who we are going to call in to chambers. Don't wander too far away. If your name is called, we would like you to come in to chambers and pursue the voir dire privately.

MR. PORTERFIELD: Pardon me, your Honor. For the convenience of the witnesses who I don't believe we are going to call today, might I excuse them?

THE COURT: You may.

MR. PORTERFIELD: Thank you, your Honor.

THE COURT: Just step out, and we'll see you in chambers.

(In chambers.)

THE COURT: Mrs. Geurts. Mr. Blaylock indicates your husband was a witness in a case.

Tell us a little bit about the case.

MR. BLAYLOCK: He was witness in a case where Dan Jenson's son was killed. Do you remember that? Last summer? Did he talk to you? It was a crosswalk. The boys were walking across a crosswalk, and got hit by a driver.

A JUROR: Was that out in Sandy?

MR. BLAYLOCK: It was out in Sandy.

A JUROR: I remember him being on that.

MR. BLAYLOCK: He was a witness for the other side.

Also, I -- I lived in your area for awhile, and I believe you are in the same stake.

A JUROR: That's right.

MR. BLAYLOCK: 33rd Ward?

A JUROR: Okay. I am living in the 11th Ward.

MR. BLAYLOCK: I wasn't sure that you were aware of that relationship. I was the attorney

for the prosecution on the case when your husband testified for the Defense.

A JUROR: I did not know that.

MR. BLAYLOCK: You weren't aware of that?

THE COURT: All that he just told you, does that make a bit of difference to you?

A JUROR: No.

THE COURT: You feel that you could fairly and impartially serve?

A JUROR: Yes, I think I could.

THE COURT: Do you have any questions?

MR. PORTERFIELD: Yes, thank you.

You don't believe that the references that Mr. Blaylock's made to your husband's testimony or the fact that you might have been associated through the church would have an effect on you?

A JUROR: No.

MR. PORTERFIELD: Okay. Thank you very much.

(Phyllis Geurts leaves, Debra Trump comes in.)

THE COURT: Mrs. Trump, you indicated during the voir dire to the Court that you were a victim of a robbery.

A JUROR: Yes.

THE COURT: Can you just go through the details, tell us how long ago, the place of employment, again, the circumstances?

A JUROR: You bet. It was in -- let's see, I thought it was eight years ago, but it is nine years ago, in American Fork, U.S. Thrift & Loan. And the manager had just left. He was going to buy us all lunch. There was just three of us that worked there. He left. And he was gone about -- he just probably got out of -- you know, quite aways away. And two gentlemen came in and pulled out a gun and said: "We'd like all your money." And he told me to get on the floor, and told the other girl to clean all the money. They didn't want any coin. And then: "Don't get off the floor until we are far enough" -- you know, for so much time. Then we got up, and they were gone, and we called the police.

THE COURT: Given that experience, do you feel that you could listen attentively to the evidence in this case, consider only the evidence in this case, follow the Court's instructions on the law and reach a fair and impartial verdict?

A JUROR: Yes, I do.

THE COURT: Mr. Blaylock, do you have any additional questions?

MR. BLAYLOCK: No.

THE COURT: Mr. Porterfield?

MR. PORTERFIELD: Mrs. Trump, I understood from your answers to the questions out in the courtroom that you've had a couple of experiences with lineup procedures?

A JUROR: Two.

MR. PORTERFIELD: And in doing those lineup identifications -- those were two different cases --

A JUROR: Yes.

MR. PORTERFIELD: -- I believe you said. And I believe you said that there were two convictions that resulted as a result partly of your identification?

A JUROR: Well, the forgery was just about a year ago. I work at a drive-up window at the bank. And he used a fake I.D. It wasn't him. We got the drivers license, and then we picked him out of the lineup.

MR. PORTERFIELD: Do you recall going through the lineup procedure, going through that?

A JUROR: Yes, I do.

MR. PORTERFIELD: Do you feel that that's a particularly reliable way of picking out --

A JUROR: In our case, it was. And I knew him, you know.

MR. PORTERFIELD: You say you knew him --

A JUROR: I didn't know him, but I knew that that was him without a doubt.

MR. PORTERFIELD: And out of those two experiences then -- and you were also, I believe -- you said you were -- you said you were robbed at gunpoint.

A JUROR: Yes.

MR. PORTERFIELD: You have been a witness to a robbery. That was the same -- one in the same case?

A JUROR: Yes.

MR. PORTERFIELD: So they were all tied together. And, basically, you've been involved in at least two procedures that involve lineups, and then convictions and witness -- you being a witness?

A JUROR: Yes.

MR. PORTERFIELD: Okay. I don't think I have anything further.

THE COURT: Given that lineup experience, do you feel that you can impartially serve?

A JUROR: Yes, I do.

THE COURT: Anything else?

Thank you.

Anyone else?

(Discussion off the record)

(Debra Trump leaves, Alta Ludlow comes into chambers.)

THE COURT: You have been a victim of crimes on a number of occasions. Can you just go through some of that again a little bit to refresh our recollections?

A JUROR: When I was about 13, our house was broken into, and a lot of our things were taken. I remember coming home to the doors open, and looking for -- walking in and just seeing everything a mess, and feeling, you know, hurt. And then my mom came home, and she was really upset. We called the police, and they couldn't get fingerprints, or anything.

Then I had a real close friend who kind of went off the deep end one day and tried to throw me off a two-story window. It was in my mother's house. She was home. So were my two little sisters. It did cause me to have a breakdown. It was really traumatic.

And then our cars being broken into, that was, I think -- you know, that was just really

hard, in one month, four times, both vehicles. We moved, but, you know, it's just -- it can only get so far away.

THE COURT: Given those experiences, do you feel that you can listen to the evidence presented in this case, apply the Court's instructions on the law, reach a fair and impartial verdict in this case?

A JUROR: I really don't know. I mean, just talking about it makes me feel kind of sick. I think if somebody tried to hurt me, or, you know, if I were to put myself in, say, the victim's circumstances, I might just decide because I know how it feels.

THE COURT: Mr. Blaylock.

MR. BLAYLOCK: I have no reason to excuse -- I mean, I have no objection.

THE COURT: Do you have any questions?

MR. PORTERFIELD: Thank you, your Honor.

Being a victim is a terrible thing. There's a tendency sometimes to assume that there's retribution that can be gotten when you -- someone is convicted -- charged with a crime, rather. Based on what you said, do you think that there might be a tendency on your part to emotionally -- and

understandably so -- but emotionally react on the facts of this case, and maybe cloud your judgment a little bit about whether or not you could decide my client's guilt or innocence independent of that reaction that you talked about, that sick feeling?

A JUROR: It would be hard. I'll be honest.

MR. PORTERFIELD: Thank you very much. That's what we want you to be. We appreciate it.

A JUROR: I don't want to convict someone just because of how I feel.

MR. PORTERFIELD: But you think that there might be a tendency.

THE COURT: Thank you; appreciate it.

(Alta Ludlow leaves, Steve Schreier comes in.)

THE COURT: Mr. Schreier, during the voir dire, you indicated you served on one military court of justice and had also experience with guns. And in your employment, you were involved in security kind of work, is that true?

A JUROR: That's affirmative.

THE COURT: Do you want to just outline some of that again briefly for us.

A JUROR: I hesitate to detail any intricacies that were involved because of that

I don't have anything else.

THE COURT: Thank you.

Anyone else?

MR. PORTERFIELD: I don't believe so, your Honor.

MR. BLAYLOCK: We are done.

THE COURT: Any objection to taking Alta Ludlow off by consent?

MR. BLAYLOCK: No.

THE COURT: You agree?

MR. PORTERFIELD: Absolutely, your Honor.

THE COURT: Does the State pass the jury for cause?

MR. BLAYLOCK: With that exception, with the understanding that she's excused, Number 17.

THE COURT: Does the Defendant pass the jury for cause?

MR. PORTERFIELD: We do, your Honor, with the same exception. We did have -- oh, I suppose Pickering we should mutually agree to strike, is that okay with you?

THE COURT: Well, we won't get that low, but I've stricken him.

MR. PORTERFIELD: Okay.

APPENDIX III

Contingent Motion to Supplement Record with Barber Affidavit

and

Affidavit of Juror Frank Barber

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	STATE'S CONTINGENT MOTION TO SUPPLEMENT THE RECORD ON APPEAL, AND SUPPORTING MEMORANDUM.
v.	:	
COREY LYNN BROOKS,	:	Case No. 920853-CA
Defendant-Appellant.	:	

Plaintiff-Appellee State of Utah, through counsel, hereby makes this contingent motion to supplement the record on appeal with the Affidavit of Frank R. Barber, who was a juror in the trial of this case. The original affidavit has been submitted to this Court with this motion; a copy is attached to the copy of this motion that is served upon defendant's appellate counsel. The State's Brief of Appellee is filed and served concurrently with this motion.

MEMORANDUM

THE AFFIDAVIT MAY BE NECESSARY FOR FULLY-ADVISED RESOLUTION OF THIS APPEAL.

Defendant Brooks's leading point on appeal consists of an argument the juror Frank Barber was "incompetent" by virtue of a schedule conflict. The conflict involved Mr. Barber's need to transport his wife to physical therapy appointments. Because of

the conflict, Mr. Barber asserted, "I am not sure that I could devote my undivided attention to the case . . ." (Br. of Appellant at 7-8). Although the trial court urged Mr. Barber to make arrangements to resolve this conflict (id.), the present record on appeal does not reveal whether Mr. Barber did so.

In response to defendant's argument on appeal, the State argues that Mr. Barber was neither "incompetent" nor "biased" under the governing legal principles, such that there was neither "plain error" nor "ineffective assistance of counsel" stemming from the trial court's and counsel's decisions to not excuse Barber for cause (Br. of Appellee at 13-16). The State is confident in the legal merit of this argument. However, if this Court does not accept the State's argument, the State believes it would be appropriate and desirable to supplement the record on appeal with juror Barber's affidavit.

In his affidavit, Mr. Barber recounts that upon being selected to sit as a juror in this case, he did in fact make arrangements to eliminate the conflict posed by his duty to his wife. Under Rule 11(h), Utah Rules of Appellate Procedure, it appears appropriate to inform this Court of this fact, which did not find its way into the original record. See, e.g., Sampson v. Richins, 770 P.2d 998, 1002 (Utah App.) (counsel must provide appellate court with all evidence relevant to issues on appeal), cert. denied, 776 P.2d 916 (Utah 1989).

The State recognizes that it is unusual to obtain post-trial evidence from jurors. In the interest of protecting juror

privacy, and particularly the privacy of juror deliberations, the State does not wish to encourage such practice as a matter of routine. This case, however, presents unusual circumstances for two reasons: First, the legal issue advanced by defendant on appeal appears to be one of first impression in Utah, such that this Court's resolution of it cannot be predicted with certainty. Second, this prosecution for aggravated robbery and burglary has already gone through two full trials, the first of which ended in a hung jury. It appears that the robbery victim, Stephanie Vert, was rather badly frightened by the robbery-burglary (see R. 450-51, where Ms. Vert needed a recess to proceed with testimony; R. 457-58, describing her upset in the aftermath of the robbery (these transcript excerpts are attached to this motion)).

Against the contingency that this Court may be dissatisfied with the State's legal analysis upon the present record, the State, in the interest of protecting the victim from further traumatization in a possible third trial, asks that juror Barber's affidavit be received into the record. That affidavit further supports the State's argument that any possible error in seating juror Barber did not cause prejudice to defendant. Supplementation of the record with Mr. Barber's affidavit will not be necessary if this Court accepts the State's primary legal argument, based upon the presently-constituted record; hence the "contingent" nature of this motion.

As a contingent motion, the State believes that resolution of it can properly await plenary consideration of this

appeal. Therefore, absent an objection from defendant, or contrary direction from this Court, the State does not request a ruling on the motion at this time.

RESPECTFULLY SUBMITTED this 26 day of March, 1993.

J. KEVIN MURPHY
Assistant Attorney General
Attorney for Plaintiff-
Appellee

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Motion and Supporting Memorandum was mailed, postage pre-paid to ELIZABETH HOLBROOK, SALT LAKE LEGAL DEFENDER ASSOC., attorneys for defendant-appellant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this ____ day of March, 1993.

ATTACHMENTS

(Barber Affidavit and Transcript Excerpts)

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	)	
Plaintiff/Appellee,	)	AFFIDAVIT OF JUROR FRANK R. Barber
-vs-	)	
COREY LYNN BROOKS,	)	Case No. 920853-CA
Defendant/Appellant.	)	

STATE OF UTAH)
:ss
County of Salt Lake)

Frank R. Barber, being duly sworn, deposes and says:

1. That I was a juror in the District Court trial of Corey Lynn Brooks on March 24 through March 27, 1992.

2. That I realize I have no obligation to comment on my jury service, but I am doing so willingly.

3. That on the first day of the trial before I was selected as a juror, I told Judge Rigtrup that my obligation to take my wife to therapy for her knee might distract me making it difficult for me to devote my undivided attention to the case being tried.

4. That Judge Rigtrup asked me to see about making other arrangements for her to get to therapy, so during the break for lunch after I had been selected as one of the jurors to hear the

case and before any of the witnesses had testified, I postponed the appointments until the next week.

5. That Judge Rigtrup inquired of me if he could have the bailiff take my wife for the therapy so I informed him that it was not a problem as I had made other arrangements for her therapy.

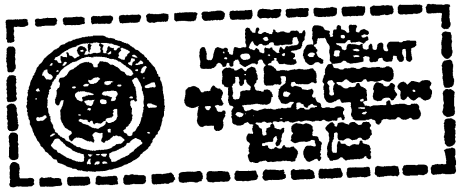
6. That I was not hampered in my deliberations by concern for my wife's therapy appointment as I resolved that problem before I heard any testimony or began deliberations with the other jurors.

DATED this 18th day of March, 19933.

Frank R. Barber

Frank R. Barber

Subscribed and sworn to before me this 18 day of March, 1993.



NOTARY PUBLIC

Q. What did he say besides "This is the man that wants to purchase the ring"?

A. He said that he was running late, and that he wouldn't be at the house until 9:00 o'clock. And then we hung up the phone.

Q. What did you do?

A. I got up and started to get ready for work.

Q. What happened then?

A. I was upstairs in the bathroom, and I heard a knock at the front door. So I walked down the stairs, and opened the door, and I glanced over at the oven -- it has a clock on it -- to see what time it was.

Q. What time was it?

A. It was 8:57.

Q. What happened then?

A. I let him in the house. And it was cold outside --

Q. You say you let him in the house. Who was it?

A. Corey, the man that's sitting right there.

Q. How was he dressed? Just take your time.

A. He had. . .

THE COURT: Would you like a brief recess?

MR. BLAYLOCK: Could we?

THE COURT: We will be in recess for five minutes.

(Jury Admonished & Recess.)

THE COURT: You may resume the stand.

MR. BLAYLOCK: Are you okay now?

A. Yes.

Q. I asked you how Corey was dressed.

A. He had a black jacket on, black Levi's, a black pair of boots, a black hat and some glasses that had a rainbow lens on them, and they were florescent green.

MR. BLAYLOCK: May I approach the witness?

THE COURT: You may.

MR. BLAYLOCK: Would you look at what's been marked as State's Proposed Exhibit No. 4?

Can you identify that?

A. These are the glasses that he wore the morning he came to my house.

Q. How can you recognize that?

A. With the rainbow lenses and the

florescent green and the way they are shaped. They are like goggles, almost; ski glasses.

Q. Now, you say "rainbow," what did you mean by that?

A. Well, the different colors. It has like a purple and green. When it hits the light, you can see blue and yellow.

Q. Changes in the light?

A. I would say, yes.

MR. BLAYLOCK: May I approach the witness?

THE COURT: You may.

MR. BLAYLOCK: Would you look at what's been marked State's Proposed Exhibit No. 7?

Would you identify those?

A. They look like the black boots he was wearing.

Q. The boots he was wearing. Were they cowboy boots?

A. Yes. They were cowboy boots; pointed toe.

Q. After you saw him at the door there, what happened? What did you do?

A. I turned to walk into the kitchen, and he followed me. He immediately asked where the ring

A. Yes. That's when I noticed I could unscrew the pipes. I could slip the handcuff off the pipe. And by that time, the phone was ringing again, and I picked up the phone. And it was my mom. And I told her that he had a gun and to call the police. And then I hung up the phone because I was so upset. I just kept hanging up the phone.

The phone rang again, and it was someone that my mom worked with, and they tried to keep me on the phone, and again I just told them to call the police and hung up the phone.

Q. Did your mom arrive?

A. It was about six minutes later when she arrived at the house. As soon as she walked in the door, she picked up the phone and called the police. They couldn't get a free line out at her work.

Q. How long had Corey been in the house?

A. Twelve minutes, because when I walked upstairs after having the handcuffs on, I noticed the clock. It was about ten or eleven minutes after 9:00.

Q. Did the police come?

A. Yes, they did.

Q. How long was it after your mother arrived that the police arrived?

A. I don't remember. I was so upset I couldn't --

Q. Do you recall how long you were upset during the day?

A. Two weeks? I missed quite a few days of work, and found it hard to go anywhere.

Q. What do you mean?

A. Just when you trust people, no one can be trusted. When I go into public places, I'm afraid.

Q. Is that still today?

A. Yes.

Q. Can you tell us what this gun looked like that he had?

A. It was black, and I could tell that the magazine went in the hand part of the gun. And it had a small, silver rim protruding out from the barrel of the gun.

Q. A small, silver --

A. Rim.

Q. Rim. You said that was from the front of the gun?

A. The barrel, the end of the barrel.

Q. Did you see Corey again after the 29th of January of last year?

A. We were called for a lineup. We were